SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 488

C. R. PITCHFORD and JEAN PITCHFORD,
Petitioners,

vs.

PETER KUZEMCHAK and LOIS KUZEMCHAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Mr. John E. Menig, on behalf of the Petitioners, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Mexico entered in the above case on May 15, 1970.

OPINIONS BELOW

The opinion of the District Court of Bernalillo County, State of New Mexico, is unreported. The opinion of the Supreme Court of the State of New Mexico is officially reported in ..... N.M. ....., 468 P.2d 409 (1970) and unoffi-

cially reported in State Bar of New Mexico Bulletin and Advance Opinions, Vol. 8, No. 45. It appears in the Appendix, p. A1. The order of the Supreme Court of New Mexico denying the Petitioners' motion for rehearing is unreported. It appears in the Appendix, p. A9.

JURISDICTION

The opinion of the New Mexico Supreme Court was dated March 23, 1970, and that is the time of its entry.

An order denying Petitioners' motion for rehearing was dated and filed May 4, 1970.

The statutory provision believed to confer jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1257 (3) (Appendix, p. A10).

QUESTION PRESENTED

The question presented for review by this Petition is as follows:

Whether a state court, when asked to determine that its prior judgment is not dischargeable in bankruptcy because it allegedly was based upon a liability for obtaining money or property by false pretenses or false representations under 11 U.S.C. 35 (a)(2), may go behind that judgment, and examine the transcript of the testimony at the original trial when the record proper shows that at no time was the defendant-bankrupt given notice that a charge of false pretenses or false representations was any part of the claim against which he was then defending.

STATUTE INVOLVED

The pertinent portion of the Federal Bankruptcy Act, 11 U.S.C. 35 (a) (2), is:

> (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretense or false representations, . . .

STATEMENT OF THE CASE

This Statement of the Case is substantially as set forth in the opinion (Appendix, p. A1).

In 1964 the respondents (Kuzemchaks) filed a complaint against the petitioners (Pitchfords) in the District Court of Bernalillo County, New Mexico. They alleged that in a written agreement to purchase their home the Pitchfords had assumed and agreed to pay the outstanding mortgage thereon. They further alleged that the Pitchfords' failure to pay the mortgage as agreed had resulted in a foreclosure and deficiency judgment, which the Kuzemchaks had been required to pay. It was for this payment that they sought judgment against the Pitchfords.

The trial court dismissed the complaint on the theory that the deed given to the Pitchfords, which conveyed the home, recited only that it was subject to the mortgage, and that the acceptance of the deed superseded the agreement and eliminated the obligation in it. On appeal, the New Mexico Supreme Court reversed. *Kuzemchak* v. *Pitchford*, 78 N.M. 378, 431 P.2d 756 (1967). The trial court, on the New Mexico Supreme Court mandate, entered judgment for the Kuzemchaks and against the Pitchfords.

The result was a judgment for breach of contract based upon a complaint that alleged solely the breach of the agreement to pay the mortgage. The New Mexico Supreme Court decision (supra) was framed solely upon the theory of the breach of contract.

On October 16, 1968, a writ of garnishment was issued upon this judgment. On October 21, 1968, the Pitchfords filed a petition in bankruptcy, and thereupon asked the trial court to quash the writ of garnishment claiming they were entitled to a stay of proceedings because of the bankruptcy. The request was granted by ex parte order. At the hearing upon a motion to vacate this order, over Pitchfords' objections, the trial court considered portions of the transcript of the testimony taken at the original trial and as a result concluded that the judgment was not dischargeable in bankruptcy under 11 U.S.C. 35 (a)(2). The trial court found that the transcript of testimony indicated it was based on an indebtedness which was incurred as a result of false pretenses and false representations fraudulently made. It was at this hearing that the Pitchfords raised the federal question of the applicability of 11 U.S.C. 35 (a)(2), and their position is preserved by requested findings of fact and conclusions of law (Appendix, p. A10). The trial court overruled the objections made to the review of the transcript of the trial testimony upon the inquiry into dischargeability, and considered the transcript. The trial court's order appears in the Appendix, p. A12.

In its review of the trial testimony from the transcript, the court found that the Pitchfords were realtors and purchased the home for immediate resale. It found that in order to induce the Kuzemchaks to sell the home to them, the Pitchfords had falsely and fraudulently represented

that they wanted the house for their personal use and occupancy.

The Pitchfords' position was that since at the time of the trial no issue had been raised as to the existence of false pretenses or false representations (Appendix, p. A10), they had not defended against the testimony or against that theory of liability. The court set aside the stay of garnishment.

The Pitchfords appealed the trial court's decision setting setting aside the stay of garnishment, to the New Mexico Supreme Court. The New Mexico Supreme Court affirmed the trial court's order in an opinion reported in *Kuzemchak* v. *Pitchford*, N.M. , 468 P.2d 409 (1970). (See Appendix, p. A1). The Pitchfords moved the New Mexico Supreme Court for a rehearing, and this motion was denied by order filed May 4, 1970. (See Appendix, p. A9).

In its opinion, the New Mexico Supreme Court recognized three conclusions which have been reached in various state courts of final jurisdiction, and in lower federal courts, which have considered the question of how far, if at all, a court may go behind its judgment in determining dischargeability or nondischargeability under 11 U.S.C. 35 (a)(2). The court attempted to balance the basic reasons for these different rules against foreseeable applications of the same, and concluded that the purposes of the Bankruptcy Act are better served by permitting the trial court to review the entire record, including the transcript of the testimony, than by limiting it to the form of judgment and the record proper.

REASONS FOR GRANTING THE WRIT

1. The New Mexico Court has decided a federal question of substance which has been decided in conflicting ways in other state courts of final jurisdiction, and in other federal courts, and which has not heretofore been determined by this Court.

The question (p. 2 of this Petition) relates specifically to the means of determining dischargeability and nondischargeability as found in Section 35 (a)(2) of the Federal Bankruptcy Act. (11 U.S.C. 35 [a][2]).

The Constitution gives Congress the power:

> "to establish a uniform Rule of Naturalization and uniform Laws on the subject of bankruptcies throughout the United States." Art. I, Sec. 8, Cl. 4.

The court below admits that there is no uniformity in this area. The authorities are divided and three conclusions have been reached (Appendix, p. A4):

a. "That the judgment is conclusive and the court will not go behind the record proper to determine the facts." *Consolidated Plan of Connecticut* v. *Bonitatibus*, 130 Conn. 199, 33 A.2d 140 (1943); *National Finance Co. of Provo* v. *Daley*, 14 Utah 263, 382 P.2d 405 (1963); *Peerson* v. *Mitchell*, 205 Okl. 530, 239 P.2d 1028, 26 ALR 1362 (1950), cert. denied 342 U.S. 866, 72 S.Ct. 106, 96 L.ed. 652 (1951); *In re Fuller* (M.D. Pa. 1937) 18 F. Supp. 394; *Harrison* v. *Donnelly*, 153 F.2d 588 (8th Cir. 1946); *Miller* v. *Rush*, 155 Colo. 178, ...P.2d 565 (1964); 1 Collier on Bankruptcy, 14th Ed., Sec. 17.16 [4].

b. "That a review of the whole record including testimony is permitted to determine the nature of the claim." *Allen* v. *Lindeman*, 164 N.W.2d 346 (Iowa 1969); *Wegiel* v. *Hogan*, 28 N.J. Super. 144, 100 A.2d

349 (1953); *In re Dutkiewicz*, 27 F.2d 334 (W.D.N.Y. 1928); *In re Kubiniec*, 2 F. Supp. 632 (W.D.N.Y. 1932); 1 Collier, Bankruptcy Manual, Section 17.00 (2nd ed. 1969).

c. "That review of the entire record and transcript of the original proceedings together with any extrinsic evidence is permitted." *Fidelity & C. Co.* v. *Golombosky*, 133 Conn. 317, 50 A.2d 817, 170 ALR 361 (1946); *United States Credit Bureau* v. *Manning*, 147 Cal. App. 2d 558, 305 P.2d 970 (1957); *Levin* v. *Singer*, 227 Md. 47, 175 A.2d 423 (1961); *Greenfield* v. *Tuccillo*, 129 F.2d 854 (2nd Cir. 1942); *Welch* v. *Old Dominion Bank*, (D.C.C.A. 1967) 229 A.2d 455.

Justice Watson, author of the New Mexico opinion admits that point "c" above is authorized only by a minority of courts.

As the opinion stands, the New Mexico court, in belief that both justice and the bankruptcy act are better served by permitting the trial court to review the entire record and transcript of testimony, found that conclusion "b" above was the view most acceptable to New Mexico.

Of the three interpretations presented by the courts, this court has not pointed to the correct one. The opinion of the New Mexico court simply contributes to the existing conflict in the decisions.

The effect of having three different approaches to inquiry into the dischargeability of a judgment debt in bankruptcy results in a varying treatment of bankrupts from one state jurisdiction to another. A conflict among decisions made by state courts of final jurisdiction has been held grounds for granting a writ of certiorari when an important question of federal statutory construction is involved. *U. S.* v. *Oregon*, 366 U.S. 643 (1961).

In those jurisdictions applying view "a", "That the judgment is conclusive, and the court will not go behind the record proper to determine the facts", the bankrupt is secure in the knowledge that the relationship between the judgment creditor and himself is fixed when the judgment is entered.

In those jurisdictions applying view "b", "That a review of the whole record including testimony is permitted to determine the nature of the claim", the bankrupt cannot know for certain what his relationship is with his judgment creditors, although by its terms the judgment was not based on false representations or false pretenses. At any time after bankruptcy, the bankrupt may be required to defend these charges. His defense then is based upon a record of testimony taken at a time when fraud was not an issue, and when he therefore was not defending against it. His prosecutor is examining the transcript of testimony in the context of charges of false representations and false pretenses, when the context out of which the testimony arose was something other than that.

In those jurisdictions applying view "c", "That review of the entire record and transcript of the original proceedings together with any extrinsic evidence is permitted", the bankrupt is exposed to the possibility of two hearings on any claim—the hearing which resulted in the judgment, plus another to ascertain whether the judgment was in fact a liability for obtaining money or property by false pretense or false representations.

A determination of the proper extent of review which should be allowed where the above question is raised is important in the administration of the Federal Bankruptcy Act. The avowed purpose of a proceeding in bankruptcy is to give bankrupts "the new opportunity in life and the clear field for future effort, which it is the purpose of

the Bankruptcy Act to afford the emancipated debtor." *Local Loan Co.* v. *Hunter*, 292 U.S. 234, 245 (1934). It is also the obvious purpose of the act to grant a discharge of honest debts to honest debtors. *Williams* v. *U.S. Fidelity Co.*, 236 U.S. 549, 554, 555 (1915). It is important that this court determine which of the three various conclusions above is most in keeping with these purposes, and which is designed properly to weed the dishonest debtors from the honest.

The view selected must be designed to afford the bankrupt the constitutional right to due process of law (U.S. Const., Amend. XIV, Sec. 1, Appendix, p. A13) in the determination of whether he is, in fact, an honest or a dishonest debtor. This subsidiary question would seem to be fairly comprised within the arguments advanced heretofore by the Petitioners in their objections to the trial court examining the transcript of trial testimony to determine if they were honest debtors, when the trial reported in that transcript was a breach of contract suit, not embracing charges of false pretenses or false representations.

The age in which it was assumed that the debtor was necessarily to be dealt with as an offender passed with the adoption of the Constitution. See *Continental Illinois Nat. Bank and Trust Co.* v. *Rock Island Ry.*, 294 U.S. 648 (1935). Yet, the effect of a decision which decides the honesty or dishonesty of a debtor based on testimony at a hearing in which he was defending a contract action, and had not been charged with having incurred liability for false representations or false pretenses, would seem to be to give credence to some presumption of guilt.

No notice of the charged offense was given before the trial recorded in the transcript and notice is a basic requirement of the due process clause. *Armstrong* v. *Monzo*, (1965) 380 U.S. 545. We therefore urge that in its con-

sideration of the three views adopted by the various states in their inquiry into the dischargeability of a judgment under 11 U.S.C., Section 35 (a)(2), this Court give recognition to the implicit due process problem.

CONCLUSION

The conflict among the various state courts of final jurisdiction in determining a question involving the rights afforded by the federal bankruptcy laws, and the choice by the New Mexico court of a rule resulting in a denial of due process, make this matter one for the granting of a writ of certiorari.

Respectfully submitted,

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(1)

Filed: 3/23/70

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8823

PETER KUZEMCHAK and LOIS KUZEMCHAK,
Plaintiffs-Appellees,

vs.

C. R. PITCHFORD and JEAN PITCHFORD,
Defendants-Appellants,

and

FRANK BROWN and BENNIE BROWN, and FRANK BROWN and BENNIE BROWN, d/b/a BROWN REALTY and BROWN TITLE COMPANY, LOS LUNAS, NEW MEXICO,
Garnishees.

Appeal from the District Court of Bernalillo County
SWOPE, District Judge

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OPINION

WATSON, JUSTICE.

In 1964, the Kuzemchaks, appellees herein, filed their complaint against the Pitchfords, appellants herein, alleging that in a written agreement to purchase their home the Pitchfords had assumed and agreed to pay the outstanding mortgage thereon. They further alleged that the Pitchfords' failure to pay the mortgage in accordance with the agreement resulted in a deficiency judgment on its foreclosure which the Kuzemchaks had been required to pay and for which they sought judgment against the Pitchfords. The trial court dismissed the complaint on the theory that the deed given to the Pitchfords, which conveyed the home, recited only that it was subject to the mortgage, and that the acceptance of the deed superseded the agreement and eliminated the obligation in it. On appeal we reversed. Kuzemchak v. Pitchford, 78 N.M. 378, 431 P.2d 756 (1967). The trial court, on our mandate, entered judgment for the Kuzemchaks and against the Pitchfords. The result was a judgment for breach of contract based upon a complaint that alleged solely the breach of the agreement to pay the mortgage.

On October 16, 1968, a writ of garnishment was issued upon this judgment. On October 21, 1968, involuntary petitions in bankruptcy were filed against the Pitchfords, who thereupon asked the trial court to release the writ of garnishment because the judgment was discharged by their bankruptcy. This request was granted by ex parte order; but after a hearing upon a motion to vacate this order, filed by the Kuzemchaks, the court vacated it and let the garnishment proceed. This appeal followed.

The issue presented by the motion to vacate was whether the judgment indebtedness was one dischargeable

by the bankruptcy act (11 U.S.C.A. Sec. 35[a][2]). Both parties filed requested findings and conclusions on this issue, and the Court adopted the plaintiffs' (judgment holders) submitted findings and conclusions to the effect that the judgment was not discharged by appellants' bankruptcy.

Section 17 (a)(2) of the Federal Bankruptcy Act, 11 U.S.C.A. Sec. 35 (a) (2), excepts from discharge in bankruptcy "liabilities for obtaining money or property by false pretenses or false representations . . ."

Appellants' sole point is:

"IT IS ERROR FOR A COURT TO DETERMINE A JUDGMENT NOT DISCHARGEABLE IN BANKRUPTCY UNDER 11 U.S.C. SEC. 35 a. (2), WHEN THE TRIAL COURT'S JUDGMENT, THE SUPREME COURT MANDATE AND THE SUPREME COURT OPINION ON WHICH THE SAID JUDGMENT WAS BASED, AND THE RECORD PROPER, CLEARLY SHOW THAT THE JUDGMENT WAS NOT BASED ON FALSE PRETENSES OR FALSE REPRESENTATIONS FRAUDULENTLY MADE."

The trial court reviewed the record and the transcript of the testimony taken at the trial of the case and found that the appellants, Pitchfords, were realtors and only purchased the home of the appellees for the purpose of immediate resale but, in order to induce Mrs. Kuzemchak to sell it, had falsely and fraudulently represented that they wanted it for their personal use and occupancy and would assume the mortgage and protect the Kuzemchaks for any liability under it. The court further found that the appellees, in reliance solely upon these false representations, sold their home to appellants expecting them to make the payments on the mortgage, which they did not do. Instead, appellants immediately resold the house and did not

protect appellees in their obligation under the mortgage. The court concluded that the judgment entered herein was thus "*based upon an indebtedness which was incurred as a result* of false pretenses and false representations fraudulently made by appellants to appellees" (emphasis ours). It was upon this conclusion that the trial court held the debt was not discharged by bankruptcy and permitted the garnishment to proceed.

Is a judgment "based upon an indebtedness which was incurred as a result of false pretenses" a "liability for obtaining money or property by false pretenses" as is required if it is to be exempted from discharge by bankruptcy? We believe the answer is yes.

The court will examine the underlying cause of action in determining the question of dischargeability of a judgment. 1 Colier [sic] Bankruptcy Manual, Sec. 17.00 at 205 (2nd ed. 1969). Prior to the act of February 5, 1903 (32 Stat. at L. 797, ch. 487), Sec. 17 (a) (2) of the Bankruptcy Act, supra, used the word "judgments" instead of "liabilities." This, the cases hold, indicates that Congress intended to use as a basis for withholding the discharge the nature of the obligation rather than the form of the judgment. 7 Remington on Bankruptcy, Sec. 3538 (5th ed. 1939).

The question upon which the courts are divided, however, is: May the judgment creditor go behind his judgment, and if so, how far, when the issue as to its dischargeability is raised? The authorities are divided. Miller v. Rush, 155 Colo. 178, 393 P.2d 565 (1964). Three conclusions have been reached including:

1. That the judgment is conclusive and the court will not go behind the record proper to determine the facts.

Consolidated Plan of Connecticut v. Bonitatibus, 130 Conn. 199, 33 A.2d 140 (1943); National Finance Co. of Provo v. Daley, 14 Utah 2d 263, 382 P.2d 405 (1963); Peerson v. Mitchell, 205 Okl. 530, 239 P.2d 1028, 26 A.L.R. 2d 1362 (1950), cert. denied 342 U.S. 866, 72 S.Ct. 106, 96 L.ed. 652 (1951); In re Fuller (Md. Pa, 1937), 18 F. Supp. 394; Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946)

2. That a review of the whole record including testimony is permitted to determine the nature of the claim.

Allen v. Lindeman, 164 N.W.2d 346 (Iowa 1969); Wegiel v. Hogan, 28 N.J. Super. 144; 100 A.2d 349 (1953); In re Dutkiewicz, 27 F.2d 334 (W.D. N.Y. 1928); In re Kubiniec, 2 F. Supp. 632 (W.D. N.Y. 1932); 1 Collier Bankruptcy Manual, Sec. 17.00 (2nd ed. 1969).

3. That review of the entire record and transcript of the original proceedings together with any extrinsic evidence is permitted.

Fidelity & C. Co. v. Golombosky, 133 Conn. 317, 50 A.2d 817, 170 A.L.R. 361 (1946).

It appears that number 3 above is authorized by only a minority of the courts. Anno. 170 A.L.R. 368; Miller v. Rush, supra. There are, however, well-reasoned opinions supporting it, including: United States Credit Bureau v. Manning, 147 Cal.App.2d 558, 305 P.2d 970 (1957); Levin v. Singer, 227 Md. 47, 175 A.2d 423 (1961); Greenfield v. Tuccillo, 129 F.2d 854 (2nd Cir. 1942). See also Welsh v. Old Dominion Bank, 229 A.2d 455 (D.C. C.A. 1967).

The question is one of first impression in New Mexico. Appellants relying upon the reasoning in Consolidated Plan of Connecticut v. Bonitatibus, supra, would have us follow conclusion number 1 above. Appellees contending for the reasoning in Fidelity & C. Co. v. Golombosky, supra, would have us follow conclusion number 3 above. Both of

these opinions are by the Connecticut Supreme Court of Errors. The personnel of that court remanded the same in each case, although Judge Dickenson, who wrote the first opinion, did dissent in the second opinion, written by Judge Maltbie. We must admit that our attempt to balance the basic reasons for the different rules against foreseeable applications of them has been as disturbing to us as it apparently was to the Connecticut court.

A review of the record before us on the issue of dischargeability does not indicate that any extrinsic evidence was offered or received, but that the trial judge simply reviewed the entire record and the transcript of the proceedings which had been prepared for the first appeal to this court. There is no indication that any party attempted to offer additional evidence or that, if offered, it would not have been reviewed. For the purpose of this case, therefore, we need only decide whether the court was limited to a review of the record proper or could also review all prior proceedings and testimony in the case to determine the dischargeability of the judgment.

In National Finance Co. of Provo v. Daley, supra, a suit was brought on a prior judgment rendered on a promissory note. There, the court held that a judgment based solely on the note obligation, where there were no issues or mention of fraud in the case, was conclusive as to its nondischargeability. The Utah court said:

> "In our judgment it better comports with the orderly processes of justice to require the plaintiff to bear the responsibility of pleading, proving and claiming the full benefit of whatever character of cause of action he possesses in the original action and of being bound thereby, than to allow another trial upon the same cause of action raising issues which could have been dealt with in the original action. This rule also serves the purpose of the bankruptcy act and at the same time

leaves the way open to guard against the discharge of debts of the character excepted from discharge if the facts so justify."

We are not so sure that it comports to the orderly process of justice to require the plaintiff to plead and prove fraud at a time when bankruptcy is not within the contemplation of the parties and when he can obtain the judgment he then requires without going into the fraud aspect which then appears entirely unnecessary. Perhaps some clemency on the part of the creditor in the original action is conducive to the orderly process of justice. Perhaps he should not be forced, in order to protect himself against the unexpected bankruptcy of the debtor, to press upon the court unnecessarily this usually vigorously contested issue. Granted, the so-called minority rule may occasion two hearings when one might do. Yet, if the creditor can safely take the note or obtain the uncontested judgment, the first hearing is eliminated or minimized; and, of course, the possibility of the second hearing is usually remote.

Neither are we sure that the purpose of the bankruptcy act is best served by thus limiting the investigation into the fraud or barring the issue when the occasion for its determination arises. Gehlen v. Patterson, 83 N.H. 328, 141 A. 914 (1928). The obvious purpose of the act is to grant a discharge of honest debts to honest debtors. Williams v. U. S. Fidelity Co., 236 U.S. 549, 35 S. Ct. 289, 59 L. Ed. 713 (1915). The act clearly did not extend its remedial purposes to those who have obtained property by false pretenses any more than to those who dishonestly misappropriated funds, as was the case in Levin v. Singer, supra.

In the case before us the findings of the trial court are supported by the evidence at the trial as shown by the

transcript. These findings support its conclusion that the indebtedness was incurred as a result of false pretenses. We believe that both justice and the purpose of the bankruptcy act are better served by permitting the trial court to review the entire record, including the transcript of the testimony, than by limiting it to the form of judgment and the record proper. See Allen v. Lindeman, supra, and cases under conclusion 2 above.

Finding no error in the trial court's order of December 18, 1968, vacating the order staying the garnishment, the same is affirmed.

IT IS SO ORDERED.

/s/ John T. Watson
Justice

WE CONCUR:

/s/ J. C. Compton, J.
/s/ Caswell S. Neal, J., Dist. Ct.

* * *

(2)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Monday, May 4, 1970

NO. 8823

PETER KUZEMCHAK and LOIS KUZEMCHAK,
Plaintiffs-Appellees,

vs.

Bernalillo County
C. R. PITCHFORD and JEAN PITCHFORD,
Defendants-Appellants,

and

FRANK BROWN and BENNIE BROWN, and FRANK BROWN and BENNIE BROWN, d/b/a BROWN REALTY and BROWN TITLE COMPANY, LOS LUNAS, NEW MEXICO,
Garnishees.

This matter coming on for consideration by the Court upon motion of Appellants for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises,

IT IS ORDERED that motion of Appellants for rehearing be and the same is hereby denied.

ATTEST: A True Copy

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

(3) 28 U.S.C. 1257 (3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

* * *

(4) (Caption omitted.) Filed Dec. 9, 1968.

DEFENDANTS' REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants respectfully request the Court make and enter the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiffs' cause of action throughout has been based upon amounts allegedly due them arising out of a deficiency under a G. I. mortgage, and the original Complaint filed herein is based upon a binder agreement, a copy of which was attached to plaintiffs' Complaint.

2. The judgment entered herein on February 23, 1966, was based upon Findings of Fact and Conclusions of Law which referred to the said binder, and in no way was the

said judgment based upon false pretenses or false representations.

3. The plaintiffs' requested Findings of Fact and Conclusions of Law were not based upon fales [sic] pretenses or false representations.

4. There were no material false representations or false pretenses relied upon by plaintiffs.

5. The opinion of the Supreme Court of the State of New Mexico upon the appeal of the Judgment was not based upon either false pretenses or false representations.

6. The judgment entered upon the mandate of the Supreme Court was not based upon false pretenses or false representations.

7. The debt due to plaintiffs is discharagable [sic] in bankruptcy.

8. All further proceedings herein should be stayed, and the Writ of Garnishment should be quashed, nullified, and set aside.

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter.

2. At no time herein have the plaintiffs proceeded on the basis of false pretenses or false representations as their theory of this action.

3. There has been no clear and convincing proof of false representations or false pretenses relied upon by the plaintiffs.

4. This Court may not go behind the judgment entered herein pursuant to the mandate of the Supreme Court

and the opinion of the said Court, in determining whether the debt was incurred as a result of false pretenses and false representations.

5. The indebtedness due to plaintiffs from defendants is discharagable [sic] in bankruptcy by reason of the provision of 11 USC 35 (a) 2.

6. All further proceedings herein should be permanently stayed and the Writ of Garnishment quashed, nullified, and set aside.

Menig and Sager
By /s/ Edward T. Curran
Attorneys for Defendants
1203 First National Bank Building, EAST
Albuquerque, New Mexico 87108

I hereby cerify [sic] that I have mailed a copy of the foregoing to opposing counsel of record and delivered a copy fo[sic] the Honorable Edwin L. Swope this 9th day of December, 1968.

By /s/ Edward T. Curran

* * *

(5) Bernalillo County District Court Cause No. A5773 (caption omitted), filed December 18, 1968.

ORDER

This matter having come before the Court for hearing upon Plaintiffs' Motion to Vacate the Court's Order of October 31, 1968, herein, and Plaintiffs being represented by Hanna, Mercer & Carpenter, by Robert C. Hanna, and Defendants being represented by Menig & Sager, Mr. Edward T. Curran appearing, and Garnishees being repre-

sented by Menig & Sager, Mr. Edward T. Curran appearing, and the Court having heard the arguments of counsel and having reviewed the file herein and the transcript of testimony and having entered its findings and conclusions upon the issue of dischargeability of the judgment in bankruptcy, the Court finds:

That Plaintiffs' Motion to Vacate the Order filed herein on October 31, 1968, is well taken and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order previously filed herein on October 31, 1968, staying proceedings herein and releasing and setting aside the Plaintiffs' Writ of Garnishment be and such Order is hereby vacated and held for naught.

IT IS FURTHER ORDERED that the Garnishees herein be and they hereby are granted five (5) days from receipt of a copy of this Order in which to reply to the Writ of Garnishment previously served on October 21, 1968.

s/ Edwin L. Swope
District Judge

* * *

(6) U. S. Const. amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and the opinion of the said Court, in determining whether the debt was incurred as a result of false pretenses and false representations.

5. The indebtedness due to plaintiffs from defendants is discharagable [sic] in bankruptcy by reason of the provision of 11 USC 35 (a) 2.

6. All further proceedings herein should be permanently stayed and the Writ of Garnishment quashed, nullified, and set aside.

Menig and Sager
By /s/ Edward T. Curran
Attorneys for Defendants
1203 First National Bank Building, EAST
Albuquerque, New Mexico 87108

I hereby cerify [sic] that I have mailed a copy of the foregoing to opposing counsel of record and delivered a copy fo[sic] the Honorable Edwin L. Swope this 9th day of December, 1968.

By /s/ Edward T. Curran

* * *

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ORDER

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sented by Menig & Sager, Mr. Edward T. Curran appearing, and the Court having heard the arguments of counsel and having reviewed the file herein and the transcript of testimony and having entered its findings and conclusions upon the issue of dischargeability of the judgment in bankruptcy, the Court finds:

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IT IS FURTHER ORDERED that the Garnishees herein be and they hereby are granted five (5) days from receipt of a copy of this Order in which to reply to the Writ of Garnishment previously served on October 21, 1968.

/s/ Edwin L. Swope
District Judge

* * *

(6) U. S. Const. amend. XIV, Sec. 1

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SUPREME COURT, U. S.

FILED

AUG 26 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 488

C. R. PITCHFORD and JEAN PITCHFORD,
Petitioners,

vs.

PETER KUZEMCHAK and LOIS KUZEMCHAK,
Respondents.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

The petitioners incorrectly argue that a Federal question of substance has been decided in conflicting ways. Such is not the case, and there is no occasion for review by this Court.

The New Mexico Supreme Court has affirmed a finding by the State District Court to the effect that the par-

ticular debt sued upon herein is not dischargeable in bankruptcy because it was a debt based upon a liability for obtaining money or property by false pretenses or false representations as described in the Federal Bankruptcy Act, 11 U.S.C. 35 (a) (2).

The mere fact that the state court has found the debt sued upon herein to come within one of the exceptions to dischargeability set forth in the Bankruptcy Act does not raise a Federal question as contended by the petitioners.

It is well established that the question of dischargeability of a particular debt which has been listed in bankruptcy is preferably a question to be determined in the state courts where the debt arose. The court in *Watts* v. *Ellithorpe*, 135 F. 2d 1 (C.A. 1), held that a creditor of a bankrupt is not entitled as a matter of right to a determination of whether the debt is dischargeable in the Federal Bankruptcy Court. The opinion points out:

> "In our opinion it still remains true that in general the effect of a discharge is to be raised by pleading it as a bar when the creditor attempts to enforce his claim, or using it to procure cancellation of a judgment entered before discharge, if the state statutes permit this procedure. In re Mussey, D.C. Mass., 99 F. 21. See In re Marshall Paper Company, supra, 102 F. at page 874; Greenfield v. Tuccillo, 2 Cir., 1942, 129 F. 2d 854; Collier on Bankruptcy, 14th Ed., Vol. 1, Sec. 1728, Note 2. Contra: Hisey v. Lewis-Gale Hospital, D.C. 1939, 27 F. Supp. 20.
>
> "Nothing in the Bankruptcy Act or in any of the decided cases compels us to reach a contrary conclusion and there are persuasive reasons why we do not believe that the (Federal) district court is required as a matter of discretion in a case like the one before us to determine the question of the dischargeability of a debt." *Watts, et al.* v. *Ellithorpe*, 135 F. 2d 1, 3.

As is further noted in the opinion:

> "The Bankruptcy Court is interested primarily in the speedy settlement of the bankrupt's estate, and we do not believe that the bankruptcy court should be required to stop and hear testimony on whether various creditors have debts which are not dischargeable."

As indicated, the question of dischargeability of a particular debt is, in fact, a question to be determined by the state court under state law. Petitioners' argument that uniformity throughout the states in the manner of determining whether a specific debt is excepted from dischargeability or not is not persuasive. Uniformity among the states in this regard is in no way required for the proper administration of the Federal Bankruptcy Act. The question is, in fact, one of local policy which should properly be determined by the Supreme Court of the individual states. There is no virtue in uniformity simply for the sake of uniformity. As indicated in the petition, the decisions in this area are not uniform from state to state, and, in fact, some states have, after consideration, modified an earlier position with respect to the *procedure* which will be adopted in that state for making a determination of dischargeability in a situation such as that in the present case. See, for example, *Fidelity and Casualty Co.* v. *Golombosky*, 133 Conn. 17, 50 A. 2d 817, 170 ALR 361, as compared with the earlier Connecticut decision in *Consolidated Plan* v. *Bonitabus*, 130 Conn. 199, 33 A. 2d 140 (1943).

The question at issue here is whether this Court should grant certiorari for the sole purpose of imposing procedural uniformity upon the states in determining the dischargeability of a debt which has been listed in a prior bankruptcy proceeding. The doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), with respect to diversity cases is analogous and applicable to dispel the "Federal question" argument urged by petitioners herein. The fact that

the Federal Bankruptcy Act has become an issue in what was otherwise a state court matter does not create a Federal question. There is no question of Federal statutory construction as alleged by petitioners. The variance in the state court decisions relates only to the procedure which will be used by the state court in taking evidence upon the issue of dischargeability in a case which was reduced to judgment prior to the petition in bankruptcy. This in no way involves any interpretation of the Federal statute which was operative in the intervening Bankruptcy proceeding. The Federal Bankruptcy proceeding must necessarily be concluded in all material respects before the state court procedural question can even arise.

Petitioners' contention that they were deprived of due process because "no notice of the charged offense was given before the trial" is without merit. The case of *Armstrong* v. *Manzo*, (1965) 380 U.S. 545, cited in support of this argument is inapplicable (Petition page 9).

A reading of the New Mexico Supreme Court opinion set out at page A-2 of the Appendix to the Petition for Writ of Certiorari clearly indicates that no attempt was made by the petitioners to offer any evidence on the issue of fraud once it became a material issue as a result of the defense of dischargeability asserted by the petitioners.[1]

The merits of such a contention were, however, passed upon by the New Mexico Supreme Court which held:

> "We are not so sure that it comports to the orderly process of justice to require the plaintiff to plead and prove fraud at a time when bankruptcy is not within the contemplation of the parties and when he can ob-

1. "A review of the record before us on the issue of dischargeability does not indicate that any extrinsic evidence was offered or received, . . . There is no indication that any party attempted to offer additional evidence or that, if offered, it would not have been reviewed." New Mexico Supreme Court opinion, petitioners' appendix A-2 at A-6.

tain the judgment he then requires without going into the fraud aspect which then appears entirely unnecessary. Perhaps some clemency on the part of the creditor in the original action is conducive to the orderly process of justice. Perhaps he should not be forced, in order to protect himself against the unexpected bankruptcy of the debtor, to press upon the court unnecessarily this usually vigorously contested issue." (Opinion, page A-7 of petitioners' appendix).

The New Mexico court further analyzed the question as follows:

"Neither are we sure that the purpose of the bankruptcy act is best served by thus limiting the investigation into the fraud or barring the issue when the occasion for its determination arises. *Gehlen* v. *Patterson*, 83 N.H. 328, 141 A. 914 (1928).

"The obvious purpose of the act is to grant a discharge of honest debts to honest debtors. *Williams* v. *U. S. Fidelity Co.*, 236 U.S. 549, 35 S.Ct. 289, 59 L.Ed. 713 (1915). The act clearly did not extend its remedial purpose to those who have obtained property by false pretenses any more than to those who dishonestly misappropriated funds, as was the case in *Levin* v. *Singer*, supra." (N. M. Supreme Court Opinion A2, A7).

The petitioners are the ones who raised the issue of dischargeability for the first time in the state court proceeding and yet they contend that they were deprived of due process because the respondents did not anticipate this subsequent action on the part of petitioners at the time of the original state court trial. Certainly, as pointed out by the New Mexico court, such a strained analysis is not required in order to satisfy the constitutional requirement of due process.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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